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SUPREME COURT, U.S.

No. 07-1256

IN THE

Supreme Court of the United States

WILD WAVES, LLC,

Petitioner,

v.

NICKELS MIDWAY PIER, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Nickels Midway Pier, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER-STATEMENT OF RELEVANT PROVISIONS INVOLVED

Bankruptcy Code, 11 U.S.C. § 365(d)(2):

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease or residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

Bankruptcy Code, 11 U.S.C. § 365(i):

(i) (1) if the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) if such purchaser remains in possession –

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any

> obligations of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
>
> (B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

Bankruptcy Code, 11 U.S.C. § 365(j):

> (j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party had paid.

COUNTER-STATEMENT OF THE CASE

Petitioner, Wild Waves, LLC ("Wild Waves") erroneously contends that this Appeal involves the enforceability of an agreement between Respondent, Nickels Midway Pier, LLC ("Nickels" or "Debtor") and Wild Waves to sell Nickels' amusement pier located in Wildwood, New Jersey. To the contrary, the true issue before this Court is what right or remedy is available to Wild Waves in the event Nickels elects, on remand to the Bankruptcy Court, to reject either or both the

commercial lease ("Lease") and oral contract for sale ("Oral Contract for Sale") with Wild Waves pursuant to 11 U.S.C. § 365 of the United States Bankruptcy Code ("Code").

Originally, Nickels only sought to reject its thirty-one (31) year (including extension options) Commercial Lease with Wild Waves. Prior to a determination on Nickels' Motion to Reject the long term Lease, the Bankruptcy Court granted limited relief from the automatic stay to permit the parties to continue with a trial, which had been pending in the Superior Court of New Jersey, Atlantic County, Chancery Division (the "State Court Action"), to determine the existence of an Oral Contract for Sale between the parties.

Based upon a finding in the State Court Action that an Oral Contract of Sale existed between the parties, Nickels renewed its Motion to Reject to encompass both the Commercial Lease and the Oral Contract for Sale[1]. In ruling on Nickels' Motion to Reject, the Bankruptcy Court treated the Commercial Lease and Oral Contract for Sale as one collective agreement; and found that Wild Waves enjoyed the rights available under Bankruptcy Code § 365(i) because Wild Waves was "in possession" under the Oral Contract for Sale, and authorized Nickels

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1. Notwithstanding the Motion to Reject, Nickels has preliminarily maintained the position that Nickels has the right to terminate the Commercial Lease and Oral Contract for Sale based upon Wild Waves' pre and post-petition defaults under each of the agreements. Therefore, there would be no agreement or contract to reject. The issues regarding Wild Waves defaults are in the process of being litigated before the Bankruptcy Court at this time.

to reject the Oral Contract for Sale. The Bankruptcy Court also ruled that Wild Waves claimed right to specific performance was pre-empted by the Bankruptcy Code.

On appeal, the District Court found that the provisions of 11 U.S.C. § 365(i) were *not* applicable, based upon the fact that Wild Waves occupied a portion of the Pier under the Commercial Lease, and it was not "in possession" under the Oral Contract for Sale. While acknowledging the Superior Court ruling that a "throughly integrated" agreement existed between Nickels and Wild Waves to sell the Pier, the District Court found that the Commercial Lease and Oral Contract of Sale were two (2) separate and distinct contracts (albeit two components of an intertwined agreement to ultimately sell the entire Pier). The District Court also affirmed the Bankruptcy Court's determination that Wild Waves' claim for specific performance of the Oral Contract for Sale is a "claim," within the meaning of Bankruptcy Code § 101(5), and thus can be discharged in a bankruptcy proceeding.

On appeal, the Third Circuit affirmed the District Court's denial of Wild Waves' claim to specific performance holding that monetary damages were a viable alternative to Wild Waves' claim to specific performance and, therefore, within the definition of a claim dischargeable in bankruptcy. The Third Circuit also affirmed the District Court's decision that the Commercial Lease and Oral Contract for Sale were two separate and divisible portions of the contract relating to the Lease and the sale of the Pier.

REASONS FOR DENYING THE PETITION

1. *The Court Below Did Not Fail To Afford Full Faith And Credit To The Superior Court Opinion.*

Wild Waves attempts to distort the scope and findings contained in the Opinion of the Superior Court by erroneously arguing that the Superior Court held that the Commercial Lease and Oral Contract for Sale were "unitary" and "not divisible." To the contrary, the Superior Court was specifically charged with the limited issue of determining whether an oral contract of sale for the Pier existed between the parties. In so doing, the Superior Court merely found that the Commercial Lease and Oral Contract for Sale were "two aspects of a throughly integrated agreement" of the parties to sell the Pier. The Superior Court's finding of the existence of an Oral Contract for Sale was not disturbed and was given full faith and credit by the Court below.

Consistent with the Superior Court Opinion, the District Court Opinion (affirmed by the Court below) found that Wild Waves had been occupying a portion of the Pier under the Lease and had the right to purchase the entire Pier under an Oral Contract for Sale, which was not exercised prior to Nickels' bankruptcy. The District Court correctly determined that the Lease and the Oral Contract for Sale are independent components of the parties' integrated agreement as to the disposition of the Pier. The District Court found that the Superior Court's use of the term "integrated" was not in the traditional legal sense, but rather, to emphasize the "interrelation of its component parts."

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While the Superior Court's decision in the State Court Action found that the parties had entered into an integrated agreement encompassing both the Commercial Lease and the Oral Contract for Sale, it did not change the fact that they are two separate aspects of the agreement which operate independently.

Indeed, the Superior Court's Opinion acknowledges the fact that the Commercial Lease and Oral Contract for Sale were *two separate and distinct contracts* that were designed to achieve their overall agreement. Judge Seltzer found that the parties had agreed that Wild Waves would first lease a portion of the Pier for the purposes of seeking financing to build the water park pursuant to the terms of the Lease. Thereafter, Nickels would sell the entire Pier to Wild Waves pursuant to the terms of the unexecuted agreement for sale.

As specifically noted by the Court below, neither the Commercial Lease nor the Oral Contract for Sale require compliance with the terms of the other. Each contract was drafted to operate separate and independent of the other. Unlike a traditional lease with a purchase option situation, the Oral Contract for Sale was not contingent upon Wild Waves compliance with the terms of the Lease. A breach by Wild Waves under the Commercial Lease does not terminate Wild Waves' right to purchase under the Oral Contract for Sale. Further, the Oral Contract for Sale does not provide for payments made under the Commercial Lease to be credited to the purchase price of the Pier.

In determining that the Lease and Oral Contract for Sale were two divisible contracts, the District Court

relied upon well settled New Jersey State law. *See Studzinksi v. Travelers Ins. Co.*, 108 N.J. Super 416, 419 (Law. Div. 1981); *Dixon v. Smyth Sales Corp.* 110 N.J.L. 459, 460-61 (E&A 1931). Indeed, an agreement is deemed to be divisible when performance consists of "several distinct and separate items." *Dixon, supra*, 110 N.J.L. at 461.

In viewing the Commercial Lease and Oral Contract for Sale as separate aspects of an interrelated agreement, the Court below did not disturb the ruling of the Superior Court and gave full faith and credit to its finding of the existence of an Oral Contract for Sale.

2. ***The Court Below Correctly Found That Wild Waves Is Not Entitled To The Equitable Remedy Of Specific Performance Upon Rejection Of The Oral Contract Of Sale.***

Wild Waves correctly states in its Petition that rejection of an executory contract under the Bankruptcy Code has the legal effect of a breach. *See* 11 U.S.C. § 365(g). However, Congress did not intend to permit debtors to reject real estate sale contracts only to have the purchaser turn around and enforce the rejected contract under State law. Congress enacted a comprehensive framework to address the rejection of real estate contracts. Under § 365, once a contract is rejected it no longer exists. Sub-sections (i) and (j) specifically address the remedies and options that are available to a purchaser who's contract has been rejected — i.e., treat the contract as terminated and obtain a lien for any payments made on account of the sale contract or remain in possession, pay the purchase

price and receive title. *See In re Heckinger Investment Co. of Del.*, 274 B.R. 71, 97 (Bankr. D. Del. 2002) (finding that preemption is appropriate where the Code comprehensively addresses such claims); *Lubrizo Enterprises, Inc. v. Richmond Metal finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985) ("allowing specific performance would obviously undercut the core purpose of rejection under § 365(a), and that consequence cannot therefore be read into Congressional intent"). Thus, the protection afforded to a purchaser "in possession" under 11 U.S.C. § 365(i)(2)(B) are intended to "compensate a purchaser for its lost right to specific performance." *In re Delaney*, 203 Bankr. Lexis 1765, * 16 (Bankr. D. Mass. 2003).

Bankruptcy Code § 365(i) specifically and comprehensively lays out the options and remedies available to a purchaser if real estate who's contract has been rejected. The State law remedy of specific performance is simply not available to a party such as Wild Waves when there has not been an award of specific performance by the State Court pre-petition. *See In re Young*, 214 B.R. 905, 911 (Bankr. D. Idaho 1997). Here, the State Court specifically held that it was not deciding the issue of specific performance as it was beyond its scope of authority.

Assuming *arguendo* any relevance under the facts of this case, under the substantive law of the State of New Jersey, specific performance relief is not a remedy available where monetary damages would make the non-breaching party whole. *See Dover Shopping Center v. Cushman's Sons, Inc.*, 63 N.J. Super 384, 394 (App. Div. 1960); *Centex Homes v. Boag*, 128 N.J. Super 385, 389

(Ch. Div. 1974); *Jersey City Redevelopment Agency v. Clean-O-Mat Corporation*, 289 N.J. Super 381, 404 (App. Div. 1996). Specific performance is appropriate only when a court cannot arrive at a legal measure of damages with a sufficient degree of certainty that no adequate legal remedy exist. *See Korblin Refrigerated Express, Inc. v. Pitterich*, 805 F.2d 96 (3d Cir. 1986). *See also Friendship Manor, Inc.* 244 N.J. Super 104 (App. Div. 1990) ("specific performance is a discretionary remedy resting on equitable principles and requiring the court to appraise the respective conduct and situations of the parties").

Here, Wild Waves' claim for specific performance can be reduced to monetary damages. In fact, through its own submissions, Wild Waves has quantified and reduced its claim for Nickels' alleged breach to a sum certain by its filing a claim in the Chapter 11 proceeding. The District Court noted that Wild Waves provided a detailed and specific calculation of the damages it would incur if the parties' agreement was rejected.

Code § 101(5) defines a "claim," which includes the right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right is liquidated or unliquidated. Thus, any right, including the right to an equitable remedy, such as specific performance, which can be deduced to monetary damages, is a "claim," even if that right could also be enforced by means of an equitable remedy. *See In re Kilpatrick*, 160 B.R. 560 (Bankr. E.D. Mich S.D. 1993). *See also, Ohio v. Kovacs*, 469 U.S. 274, 280, 105 S. Ct. 705, 708, 83 L. Ed. 2d 649 (1985) ("in some states, a judgment for specific performance may be

satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of proceeding under Title 11"). Specific performance is only available in instances where the remedy at law fails to do justice to the parties. *Fleisher v. James Drug Stores, Inc.*, 1 N.J. 138, 146 (1948). Wild Waves' rights, if any, are provided for and protected under the provisions of § 365(i) and (j).

Wild Waves reliance upon the ruling in *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301 (3rd Cir. 1999) is misplaced and distinguishable from the facts of this case. In the *Ben Franklin* case, the Court's determination as to the availability of specific performance was based upon a finding that monetary payment was not a viable alternative. *Id.* at 306. In this case, however, Wild Waves has not only filed a proof of claim and provided a detailed calculation of its monetary damages on rejection of the contract but also, enjoys a long term lease for the use of approximately 70% of the Pier. *See* District Court Opinion at Note 15. In that regard, the District Court noted that the "fact that a creditor's specific performance remedy is preferable to a damages remedy does not mean that a creditor's right to specific performance cannot be reduced to a claim in bankruptcy." Any other interpretation would render the rejection provisions of Code § 365 meaningless as to many contracts. The Court below correctly found that under the circumstances of this case, monetary damages are viable alternative to specific performance and "the Bankruptcy Code provides a mechanism for addressing the claim for relief."

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petitioner's request for the issuance of a Writ of Certiorari be denied.

Respectfully submitted,

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